MUNAWAR AHMAD ANEES A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CRIMINAL REVIEW NO: W-09-31-03]
23 DECEMBER 2009 C

CRIMINAL PROCEDURE: *Judgment - Setting aside - Application to review and set aside decision of court - Whether review of court's own decision viable - Applicant urging court to reopen appeal already determined by High Court, Court of Appeal and Federal Court - Whether constituted an abuse of process of court - Whether application wholly without merit* D

This application *vide* notice of motion filed by the applicant sought, *inter alia*, to review and set aside the decision of this court which had dismissed the applicant's appeal against the decision of the High Court. The applicant also sought an order that the appeal before the High Court be heard on its merits and to call witnesses as required. The applicant was originally charged at the Kuala Lumpur Sessions Court with the offence of gross indecency under s. 377D of the Penal Code. The applicant pleaded guilty to the charge. He was convicted and sentenced to six months' imprisonment with effect from the date of arrest *ie*, 18 September 1998. On 29 September 1998, the applicant filed a notice of appeal in the High Court against the Sessions Court's decision. When the applicant was absent on the date of the hearing of his appeal on 9 September 2003, the High Court judge, in exercising the powers under s. 313(2) of the Criminal Procedure Code, dismissed the appeal. The applicant's appeal against the decision of the High Court was dismissed by this court on 30 October 2007. On 15 November 2008, the applicant filed a notice of motion in the Federal Court urging the Federal Court to invoke its power under r. 137 of the Rules of the Federal Court 1995 so as to review and set aside the order made by this court and to have the appeal heard on its merits. That notice of motion was unanimously dismissed by the Federal Court on 30 October 2008, as reported in *Munawar Ahmad Anees v. PP* [2009] 2 CLJ 42. The applicant sought support in *Ramanathan Chelliah v. PP* and submitted that a review of its own E F G H I

A decision was viable. The deputy public prosecutor responded that the applicant should not be allowed to relitigate on an issue pertaining to the conviction and sentence meted out to him on his own guilty plea which had been subsequently heard and determined by the High Court, the Court of Appeal and the Federal Court.

B

Held (dismissing the application)
Per Low Hop Bing JCA:

(1) The applicant was urging the court to reopen the appeal which had been dealt with by the High Court on 9 September 2003, then by this court which had delivered its decision on 30 October 2007 dismissing his appeal, and finally by the Federal Court as alluded to above. The instant application herein reflected the conduct of an indefatigable idealist who was unable to accept the finality of proceedings. He chose to plod on, notwithstanding that the instant application clearly constituted an abuse of the process of the court. (paras 10 & 11)

(2) The applicant had pleaded guilty to the charge preferred against him, as a result of which he was convicted and sentenced. He then chose to be absent when his appeal came up for hearing and determination in the High Court. Given that factual background, the applicant's appeal to this court was dismissed. There was no manifest injustice or departure from the well-established principles of procedural fairness. It was also singularly significant to refer to the applicant's own application *sub nom*, *Munawar Ahmad Anees*, which clearly showed that the applicant had already gone to the Federal Court on the same subject matter as in the instant appeal. That was the application by the applicant, to move the Federal Court in order to invoke its power under r. 137 to review and set aside the order made by this court. Without any difficulty, the Federal Court had dismissed that application. Hence, the application herein was wholly without merit. (paras 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Permohonan ini di bawah notis usul yang difailkan oleh pemohon memohon, antara lain, untuk kajian semula dan mengenepikan keputusan mahkamah ini yang telah menolak rayuan pemohon terhadap keputusan Mahkamah Tinggi. Pemohon juga memohon perintah bahawa rayuan di hadapan Mahkamah Tinggi dibicarakan atas merit-merit dan untuk memanggil saksi yang diperlukan. Pemohon telah dituduh di Mahkamah Sesyen Kuala Lumpur dengan kesalahan sumbang melampau di bawah s. 377D Kanun

Keseksaan. Pemohon mengaku salah ke atas tuduhan tersebut. Pemohon disabit dan dihukum penjara enam bulan dengan efek dari tarikh tahanan iaitu 18 September 1998. Pada 29 september 1998, pemohon memfailkan notis rayuan di dalam Mahkamah Tinggi terhadap keputusan Mahkamah Sesyen. Apabila pemohon tidak menghadirkan diri pada tarikh bicara rayuannya pada 9 September 2003, hakim Mahkamah Tinggi, dalam melaksanakan kuasa di bawah s. 313(2) Kanun Prosedur Jenayah, menolak rayuan. Rayuan pemohon terhadap keputusan Mahkamah Tinggi telah ditolak oleh mahkamah ini pada 30 Oktober 2007. Pada 15 November 2008, pemohon memfailkan notis usul di Mahkamah Persekutuan yang memohon Mahkamah Persekutuan menggunakan kuasanya di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995 supaya mengkaji semula dan mengenepikan perintah yang diberi oleh mahkamah ini dan untuk rayuan dibicarakan atas merit-merit. Notis usul tersebut telah secara sebulat suara ditolak oleh Mahkamah Persekutuan pada 30 Oktober 2008, seperti dilaporkan dalam kes *Munawar Ahmad Anees v. PP* [2009] 2 CLJ 42. Pemohon memohon sokongan dari kes *Ramanathan Chelliah v. PP* dan berhujah bahawa kajian semula keputusannya adalah viable. Timbalan Pendakwaraya membalas bahawa pemohon tidak patut diberi kebenaran untuk melitigasi semula isu mengenai sabitan dan hukuman yang telah dijatuhkan ke atas pemohon atas pengakuan salahnya sendiri yang kemudiannya telah dibicarakan dan diputuskan oleh Mahkamah Tinggi, Mahkamah rayuan dan Mahkamah Persekutuan.

Diputuskan (menolak permohonan)
Oleh Low Hop Bing HMR:

(1) Pemohon memohon kepada mahkamah untuk membuka balik rayuan yang telah dibicarakan di Mahkamah Tinggi pada 9 September 2003, seterusnya oleh mahkamah ini yang telah memberi keputusannya pada 30 Oktober 2007 menolak rayuannya, dan akhirnya oleh Mahkamah Persekutuan seperti yang dinyatakan di atas. Permohonan ini menggambarkan kelakuan 'indefatigable idealist' yang tidak dapat menerima kata putus prosiding. Beliau telah memilih untuk meneruskan, walaupun permohonan ini jelas merupakan penyalahgunaan proses mahkamah.

(2) Pemohon telah mengaku salah terhadap tuduhan yang dituduh terhadapnya, dan beliau telah disabit dan dihukum. Pemohon selepas itu tidak menghadirkan diri apabila rayuannya dibicarakan dan diputuskan di Mahkamah Tinggi. Memandangkan fakta-fakta yang telah diberi, rayuan pemohon

kepada mahkamah ini telah ditolak. Tidak terdapat ketidakadilan atau kekhilafan serius prinsip-prinsip mantap prosedur keadilan. Ia juga penting untuk merujuk kepada permohonan pemohon *sub nom*, *Munawar Ahmad Anees*, yang jelas menunjukkan bahawa pemohon telah ke Mahkamah Persekutuan di atas hal perkara yang sama seperti di dalam rayuan ini. Itu adalah permohonan pemohon, untuk memohon Mahkamah Persekutuan menggunakan kuasanya di bawah k. 137 untuk mengkaji semula dan mengenepikan perintah yang dibuat oleh mahkamah ini. Tanpa apa-apa kesusahan, Mahkamah Persekutuan telah menolak permohonan. Oleh itu, permohonan ini adalah tanpa apa-apa merit.

Case(s) referred to:
Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 5 CLJ 1 FC ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***
Munawar Ahmad Anees v. PP [2009] 2 CLJ 42 FC ***(refd)***
Ramanathan Chelliah v. PP [2009] 6 CLJ 55 CA ***(dist)***
Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 26, 50, 87
Criminal Procedure Code, s. 313(2)
Federal Constitution, arts. 121(2)(a), 128(3)
Penal Code, ss. 354, 377D
Rules of the Federal Court 1995, r. 137

For the appellant - Manjeet Singh Dhillon (M Puravalen & Amrit Singh Pal with him); M/s Isharidah, Ho, Chong & Menon
For the respondent - Awang Armadajaya DPP

[Appeal from High Court, Kuala Lumpur; Criminal Appeal No: 42-44-1998]

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing JCA:

Application

[1] This application *vide* notice of motion filed by the applicant seeks, *inter alia*, to review and set aside the decision of this court which had on 30 October 2007 dismissed the applicant's appeal

against the decision of the High Court. The applicant also sought an order that the appeal before the High Court be heard on its merits and to call witnesses as required.

Factual Background

[2] The applicant was originally charged at the Kuala Lumpur Sessions Court with the offence of gross indecency under s. 377D of the Penal Code.

[3] The applicant pleaded guilty to the charge. He was convicted and sentenced on 19 September 1998 to six months imprisonment with effect from the date of arrest ie, 18 September 1998. On 29 September 1998, the applicant filed a notice of appeal in the High Court against the Sessions Court decision.

[4] Meanwhile, the applicant began serving sentence at the Kajang Prison. Subsequently, he was admitted to the National Heart Institute on 23 September 1998. He was later transferred to the Coronary Rehabilitation Ward No. 29 of the Kuala Lumpur General Hospital, and remained there until the completion of his imprisonment term on 6 January 1999.

[5] When the applicant was absent on the date of the hearing of his appeal on 9 September 2003, the learned High Court judge, in exercising the powers under s. 313(2) of the Criminal Procedure Code, dismissed the appeal. Section 313(2) reads as follows:

> (1) ...
>
> (2) If the appellant does not appear to support his appeal the Court may consider his appeal and make such order thereon as it thinks fit:
>
> Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction ..., except on such terms as it thinks fit to impose.

[6] The applicant's appeal against the decision of the High Court was dismissed by this court on 30 October 2007.

[7] On 15 November 2008, the applicant filed a notice of motion in the Federal Court urging the Federal Court to invoke its power under r. 137 of the Rules of the Federal Court 1995 so as to review and set aside the order made by this court and to have the appeal

heard on its merits. That notice of motion was unanimously dismissed by the Federal Court on 30 October 2008, as reported in *Munawar Ahmad Anees v. PP* [2009] 2 CLJ 42.

[8] The Federal Court, speaking through Zulkefli Makinudin FCJ, examined the applicant's constitutional right of hearing, in the light of s. 313(2), and found that since the applicant had failed to appear personally in court for his appeal to be heard on several occasions whereby the hearing of the appeal had to be repeatedly postponed, that would be a ground to justify the dismissal of the applicant's appeal.

Review Jurisdiction

[9] Learned counsel Mr Manjeet Singh Dhillon (assisted by Mr M Puravalen and Mr Amrit Singh Pal) sought support in *Ramanathan Chelliah v. PP* [2009] 6 CLJ 55 CA and submitted that a review of its own decision is viable:

(1) If it can be shown that there was a probability of a significant injustice which must be clearly established; and

(2) If there was no effective alternative remedy to correct this injustice.

[10] Mr Awang Armadajaya, learned deputy public prosecutor, responded that the applicant should not be allowed to relitigate on an issue pertaining to the conviction and sentence meted out to him on his own guilty plea which has been subsequently heard and determined by the High Court, the Court of Appeal, and the Federal Court.

[11] In our view, the applicant is urging us to reopen the appeal which has been dealt with by the High Court on 9 September 2003, then by this court which had delivered its decision on 30 October 2007 dismissing his appeal, and finally by the Federal Court, as alluded to above. The instant application before us reflects the conduct of an indefatigable idealist who is unable to accept the finality of proceedings. He chooses to plod on, notwithstanding that the instant application clearly constitutes an abuse of the process of the court.

[12] As a matter of fact, the applicant had, prior to the instant application, already persistently pursued the due process of law. He had exercised his right in the trial court ie, the Sessions Court, followed by two appeals *viz*, one intermediate appeal in the High

Court and a final appeal in the Court of Appeal. This pyramidal judicial system of "one trial + two appeals" has been ably explained by Mohtar Abdullah FCJ (as he then was) in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645, with specific reference to the process of appeals from the High Court to the Federal Court under arts. 121(2)(a) and 128(3) of the Federal Constitution in the following passage:

> A harmonious interpretation of art 128(3) *vis-a-vis* art. 121(2)(a) of the Constitution will promote the purpose or object of the law providing for a three tiered pyramidal judicial system of 'one trial + two appeals' as envisaged in the Constitution and structured accordingly in the CJA.

[13] Where an appeal originates from the Sessions Court, the process of "one trial + two appeals" is regulated by the provisions of ss. 26, 50 and 87 of the Courts of Judicature Act 1964.

[14] Section 26 sets out the appellate criminal jurisdiction of the High Court ie, to hear criminal appeals from subordinate courts *viz* sessions and magistrate's courts.

[15] Section 50(1)(b) provides for the jurisdiction of this court to hear and determine any criminal appeal against any decision made by the High Court in the exercise of eg, appellate jurisdiction in respect of any criminal matter decided by eg, the Sessions Court.

[16] Section 87 confers jurisdiction on the Federal Court to hear and determine any appeal from any decision of the Court of Appeal in the exercise of its appellate jurisdiction in respect of any criminal matter decided by the High Court in exercising its original (but not appellate) jurisdiction.

[17] Section 50(1) was considered in *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201, 215. Zaki Tun Azmi PCA (now CJ Malaysia) concluded that:

> [35] According to s. 50(1), criminal cases decided by the Sessions Court may be appealed up to the Court of Appeal while those made by the Magistrate is also appealable up to the Court of Appeal, but only with leave of the Court of Appeal. Section 50 read with s. 87 means that, criminal matters originating in the Sessions Court and the Magistrate Court must end at the Court of Appeal.

[18] In *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 FC, the issue was whether r. 137 of the Rules of the Federal Court 1995 permitted an appeal to the Federal Court in a matter that commenced in the sessions court hearing motor vehicle accident cases. Abdul Hamid Mohamad CJ Malaysia (as he then was) delivered the judgment of the Federal Court and held (paras [15], [20], [22] and [28]) that r. 137 "cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act 1964 and other statutes. If the law provides for an appeal, then there is. It is not within the jurisdiction of the court to create appeals when the statute does not provide or, as in this case, clearly does not permit. Since there is no further appeal to this court, then the Court of Appeal becomes the apex court as far as actions and suits in respect of motor vehicle accidents are concerned. That is the intention of the legislature and it is incumbent upon this court to give effect to it. When the law states that the decision of the Court of Appeal is final, then the appeal process should stop at the Court of Appeal; it cannot be allowed to come to this court by way of a review process under r. 137".

[19] Reverting to the mainstream of the instant application, the applicant has relied heavily on *Ramanathan Chelliah*, *supra*. There, the accused was convicted by the sessions court on two charges of outraging modesty under s. 354 of the Penal Code. On appeal, the accused raised several points. However, the High Court confined itself to only the delay point and the direction as to the standard of proof, and quashed the conviction. The prosecution's subsequent appeal to the Court of Appeal was allowed and the conviction was reinstated. The affidavits revealed that when the prosecution's appeal came before the Court of Appeal, counsel on both sides only argued on the two points relied upon by the High Court to quash the conviction. However, the Court of Appeal proceeded to deal with other points in the case and had rejected the attempt by the accused to address the arguments on the other points, on the ground that the court was *functus officio*. Hence, the application by the accused to set aside the order on the ground that it had been made without an opportunity being given to him to support the acquittal on grounds other than those given by the High Court. Two issues arose for the court's determination *viz*:

(1) Whether the court had jurisdiction to review its earlier decision in an appeal heard and disposed by it?

(2) If there was jurisdiction, the circumstances in which the review was available. A

[20] In allowing the application, Gopal Sri Ram JCA (now FCJ) who delivered judgment for this court held:

B

(1) It is settled that this court had jurisdiction to review its own decision in a given case ie, a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there was no further recourse to a party. On the facts, since the accused was tried in a subordinate court, the Court of Appeal was the court of last resort. The jurisdiction to reopen and review was therefore important in that case to ensure that a manifest injustice does not go by uncorrected (see paras 2 - 3). C

(2) The residual jurisdiction will be exercised if it can be shown that there was a probability of a significant injustice which must be clearly established and there was no effective alternative remedy to correct the injustice. That case was one in which an injustice was occasioned and there was no effective alternative remedy available to the accused (see paras 4 - 5). D E

(3) The accused was clearly entitled to put forward other arguments in support of the orders made by the High Court in response to the prosecution's appeal. However that opportunity was denied to the accused and that constituted a serious departure from well established principles of procedural fairness, a miscarriage of procedural justice warranting the exercise of the residual power of the court to set aside its earlier judgment (see para 6). F

G

[21] With the utmost respect, we found the factual background in *Ramanathan Chelliah*, *supra*, readily distinguishable from that in the instant appeal, wherein the applicant had actually pleaded guilty to the charge preferred against him, as a result of which he was convicted and sentenced. He then chose to be absent when his appeal came up for hearing and determination in the High Court. Given that factual background, the applicant's appeal to this court was eventually dismissed. We therefore do not see any manifest injustice or departure from the well-established principles of procedural fairness. That being the case, *Ramanathan Chelliah*, *supra*, is obviously of no assistance whatsoever to the applicant herein. H I

[22] It is singularly significant for us to refer to the applicant's own application *sub nom*, *Munawar Ahmad Anees*, *supra*, which clearly shows that the applicant had already gone to the Federal Court on the same subject matter as in the instant appeal. That was the application by the applicant, to move the Federal Court in order to invoke its power under r. 137 to review and set aside the order made by this court. Without any difficulty, the Federal Court had dismissed that application. Zulkefli Makinudin FCJ, delivering the judgment of the court, held that:

> Since the applicant's case originated from the Sessions Court and the High Court had heard this case in its appellate capacity and was not acting under its original jurisdiction, and wherein the applicant had exhausted his rights of appeal at the Court of Appeal, it therefore followed that the Federal Court could not deal with this matter for want of jurisdiction as stipulated under s. 87 Courts of Judicature Act 1964 ('CJA'). In view of the provisions in s. 87 CJA, the Federal Court is only reposed with the jurisdiction to hear an appeal from the decision "in respect of any criminal matter decided by the High Court in its original jurisdiction". In the absence of jurisdiction such as provided by s. 87 CJA, r. 137 RFC being a procedural law, could not be invoked to confer jurisdiction to the Federal Court to review a case. On this ground alone, this application ought to be dismissed (paras 10, 11, 13 & 19).

Conclusion

[23] On the foregoing grounds, we held that the application herein was wholly without merit. We had accordingly dismissed it.